Michael K. Jeanes, Clerk of Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2012-009247 06/27/2012

HONORABLE DEAN M. FINK

CLERK OF THE COURT
S. Brown
Deputy

KEN JONES, et al.

CARRIE ANN SITREN
CLINT BOLICK

v.

ELAINE SCRUGGS, et al.

BARRY R SANDERS

GARY L BIRNBAUM
CRAIG D TINDALL

UNDER ADVISEMENT RULING

The Court took this matter under advisement following lengthy oral argument on June 19, 2012. Upon further consideration of the argument and the case file, the Court rules as follows.

First, the Court reiterates its prior notice that pursuant to Rule 65(a)(2), Ariz.R.Civ.P., the Court has advanced the trial of this action on the merits and consolidated the same with the hearing on the application for preliminary injunction. Both sides indicated their assent to this course of action at the oral argument.

Count II of the Complaint was resolved at oral argument. The City concedes that, as to the emergency clause only, the ordinance failed to receive a sufficient affirmative vote, and that the emergency clause is therefore inoperable. As there were sufficient votes to pass the ordinance (save for the emergency clause), the Court has declined the Plaintiffs' invitation to invalidate the entire ordinance on this basis. As discussed at oral argument, the parties subsequently filed a Stipulation indicating agreed-upon language for an order of the Court related to the emergency clause of the ordinance. Consistent therewith,

IT IS HEREBY ORDERED pursuant to the stipulation of the parties, the Court finds that, in light of the 4 – 2 vote of the Glendale City Council adopting Ordinance No. 2904 NS, the emergency clause comprising sec. 7 of Ordinance No. 2904 NS is inoperative and the Court declares it to be of no force or effect.

Turning now to Count I of the Complaint, that count strikes the Court as trivial. The City Council enacted both an ordinance and a resolution. The ordinance is the act for the sale or lease of public property; the resolution makes factual findings relevant to the lease and directs the City Manager and City Clerk in the manner by which the lease is to be executed. The Court can find in the City Charter no basis for requiring that any of the matter in the resolution must be placed instead in the ordinance; nor does it believe that the resolution would stand as an independent basis for the lease were the ordinance for some reason to fall. Accordingly,

IT IS HEREBY ORDERED denying the relief requested based upon Count I of the Complaint.

Turning finally to Count III, Section 2-145 of the Purchasing Ordinance requires a competitive bidding process for the procurement of "supplies and services" in excess of $50,000. The definitions section, Section 2-138, defines "service" as "the furnishing of labor, time or effort by a contractor," but specifically excludes from its scope "professional services." The question presented to this Court is whether arena management falls within the scope of "professional services," and therefore, is excluded from the competitive bidding process. The ordinance enacted by the City Council is entitled to a presumption of validity per Arizona law. *See, e.g., Home Builders Ass'n of Cent. Arizona v. City of Scottsdale*, 187 Ariz. 479, 482, 930 P.2d 993, 996 (1997) (ordinances are legislative acts that come "to the court cloaked with a presumption of validity."); *Council of City of Phoenix v. Winn*, 70 Ariz. 316, 318, 220 P.2d 222, 223 (1950) ("Ordinances and statutes are presumed to be valid unless it clearly appears otherwise."). The Court notes that the Plaintiffs themselves characterized the relevant service in their Complaint as that provided by "professional management companies" (*see* Complaint, p. 6), though they backtracked from this characterization at oral argument. The Court, however, finds such a characterization is accurate. It is not persuaded otherwise by *Western Corrections Group, Inc. v. Tierney*, 208 Ariz. 583 (App. 2004). That opinion was expressly limited to the definition of "professional services" as used by the state legislature in enacting A.R.S. § 11-254.01, a statute applying only to counties. *Id.* at 588 ¶ 20. As the Court of Appeals acknowledged, numerous other jurisdictions, including at least two in Arizona, have followed a broader definition not limited to services requiring advanced training to lawfully perform. *Id.* at 588 n.2. This alternative definition holds that a "'professional' act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or

manual." *Id*. (quoting *Marx v. Hartford Accident & Indem. Co.*, 157 N.W.2d 870, 872 (Neb. 1968)). Indeed, inclusion of "consultants," despite their lack of a formal academic qualification, as an example of a "professional service" indicates that the Glendale ordinance was intended to follow the latter definition, rather than the slightly more narrow *Tierney* definition. Although there may be no recognized academic degree in arena management, plainly a wide range of specialized knowledge, predominantly mental or intellectual, is critical to success in the field. The Court finds that the arena management contract calls for the provision of professional services and therefore falls outside the scope of the Purchasing Ordinance. The Court further finds that the Plaintiffs, based on the record before the Court, failed to overcome the presumption of validity ascribed to Ordinance No. 2904 NS. Accordingly,

IT IS HEREBY ORDERED denying the relief requested based upon Count III of the Complaint.

IT IS FURTHER ORDERED that any appropriate Statement of Taxable Costs and/or Application for Attorneys' Fees shall be filed no later than July 12, 2012.

Although Rule 58(g), Ariz.R.Civ.P., provides that judgments should normally not be entered until all attorneys' fee issues have been resolved and can, therefore, be addressed in the judgment, this strikes the Court as one of the rare instances in which delaying an appealable judgment to resolve attorneys' fees could be detrimental.

Accordingly, consistent with Rule 54(b), Ariz.R.Civ.P., and the Court finding no just cause for delay, the Court signs this minute entry and directs the Clerk of Court to enter same forthwith.

/s/ HON. Dean M. Fink

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JUDGE OF THE SUPERIOR COURT
HONORABLE DEAN M. FINK

ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.